

Brian D. Huben (Cal. Bar No. 134354)  
Dustin P. Branch (Cal. Bar No. 174909)

**BALLARD SPAHR LLP**

2029 Century Park East, Suite 800

Los Angeles, CA 90067-2909

Telephone: 424.204.4400

Facsimile: 424.204.4350

E-mail: hubenb@ballardspahr.com

E-mail: branchd@ballardspahr.com

Attorneys for Landlord Creditors  
Centennial Real Estate Company, LLC,  
Passco Companies, LLC, Starwood Retail Partners LLC,  
The Macerich Company, Vintage Real Estate, LLC, and  
Westfield, LLC

**UNITED STATES BANKRUPTCY COURT**

**CENTRAL DISTRICT OF CALIFORNIA**

**LOS ANGELES DIVISION**

In re	)	Chapter 11
	)	
SHIEKH SHOES, LLC, a California limited	)	Case No. 2:17-bk-24626-VZ
liability company,	)	
	)	<b>LIMITED OBJECTION TO DEBTOR'S</b>
	)	<b>EMERGENCY MOTION FOR INTERIM</b>
Debtor.	)	<b>AND FINAL ORDERS AUTHORIZING</b>
	)	<b>DEBTOR TO OBTAIN SHORT-TERM</b>
	)	<b>VENDOR FINANCING FROM NIKE</b>
	)	<b>USA, INC. AND GRANTING RELATED</b>
	)	<b>RELIEF</b>
	)	
	)	Date: January 30, 2018
	)	Time: 2:00 p.m.
	)	Place: Courtroom 1368

Centennial Real Estate Company, LLC, Passco Companies, LLC, Starwood Retail Partners LLC, The Macerich Company, Vintage Real Estate, LLC, and Westfield, LLC (collectively, the "Landlords"), hereby file this limited objection (the "Objection") to the Debtor's *Emergency Motion For Interim And Final Orders: (1) Authorizing Debtor To Obtain Short-Term Vendor Financing From Nike USA, Inc., Secured By Senior Lien Under 11 U.S.C. § 364; (2) Authorizing Use Of Cash Collateral Under 11 U.S.C. § 363; (3) Scheduling Final Hearing On*

*Motion; And (4) Granting Related Relief* (Docket No. 369; the “Nike Financing Motion”),<sup>1</sup> and respectfully submit as follows:

**I. BACKGROUND FACTS**

1. Shiekh Shoes, LLC (the “Debtor”) filed its voluntary petition for relief under Chapter 11 of Title 11 of the United States Code on November 29, 2017 (the “Petition Date”). The Debtor continues to operate its business and manage its properties as debtor-in-possession pursuant to 11 U.S.C. §§ 1107(a) and 1108.<sup>2</sup>

2. The Debtor leases retail space (the “Premises”) from the Landlords pursuant to unexpired leases of nonresidential real property (collectively, the “Leases”)<sup>3</sup> at the shopping center locations (collectively, the “Centers”) identified on the attached Schedule A.

3. Each Lease is a “lease of real property in a shopping center” as that term is used in 11 U.S.C. § 365(b)(3). *See In re Joshua Slocum, Ltd.*, 922 F.2d 1081, 1086-1087 (3<sup>rd</sup> Cir. 1990).

4. On January 26, 2018, the Debtor filed the Nike Financing Motion in an effort to maximize sales in the next 30 days. The Landlords recognize the Debtor’s liquidity issues, and are agreeable to some short delay in the payment of February 2018 rent, but must receive some adequate protection in exchange. Thus, any order approving Nike financing must: (a) make it clear that there are no liens on the Leases, and, (b) provide some form of adequate protection for the payment of February 2018 rent.

**II. ARGUMENT**

**A. There can be no lien on the Leases.**

5. As with the previous orders entered in this case providing the Debtor with post-petition financing, no security interest may be granted on the Leases - - it must be limited to the proceeds of the disposition of the Leases.

6. Provisions restricting a tenant’s ability to encumber leases are critical to the Landlords’ abilities to control their properties and comply with their own financing and

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<sup>1</sup> Terms not otherwise defined here shall have the meanings ascribed to them in the Nike Financing Motion and accompanying documents.

<sup>2</sup> Unless otherwise specified, all statutory references to a “Section” are to 11 U.S.C. §§ 101 *et seq.* (the “Bankruptcy Code”).

<sup>3</sup> Despite the Debtor assertions, the Landlords do not agree that all Leases have been assigned to the Debtor.

Ballard Spahr LLP  
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Los Angeles, CA 90067-2909  
Telephone: 424.204.4400

1 investment covenants. Any compromise of these provisions creates breaches which adversely  
2 affect the Centers. Section 364 does not empower the Debtor (or its lender) to render such lease  
3 provisions unenforceable. The United States Supreme Court consistently affirms that bankruptcy  
4 courts are to uphold nonbankruptcy rights unless a specific bankruptcy provision or policy  
5 requires differently. Butner v. United States, 440 U.S. 48, 55 (1979). “‘Property rights are  
6 created and defined by state law,’ and ‘[u]nless some federal interest requires a different result,  
7 there is no reason why such interests should be analyzed differently simply because an interested  
8 party is involved in a bankruptcy proceeding.’” Stern v. Marshall, 131 S. Ct. 2594, 2616 (2011).  
9 The burden to demonstrate that bankruptcy law overrides applicable state law falls on the party  
10 making that assertion. *See* Raleigh v. Illinois Dept. of Revenue, 530 U.S. 15, 25 (2000); Butner,  
11 440 U.S. at 55. A lease provision enforceable under applicable state law is thus enforceable in a  
12 bankruptcy case, absent a specific bankruptcy provision to the contrary.

13 **B. There must be adequate protection for the payment of February 2018 rent.**

14 7. Ironically, the Essential Expenses listed in the Nike Financing Motion do *not*  
15 include February 2018 rent. The Essential Expenses are payroll, sales taxes, and  
16 utilities/insurance. Despite the fact that the Debtor will use the Premises to generate some of the  
17 \$7 million in sales for the benefit of all creditors of the estate, no rent will be paid. At a  
18 minimum, the Debtor, must be ordered to pay February 2018 rent by a date certain.

19 8. The Debtor’s obligation to pay post-petition rent is clear. The relevant portion of  
20 11 U.S.C. § 365(d)(3) provides:

21 The trustee shall timely perform all of the obligations of the  
22 debtor, except those specified in section 365(b)(2), arising  
23 from and after the order for relief under any unexpired lease  
of nonresidential real property, until such lease is assumed or  
rejected, notwithstanding section 503(b)(1) of this title.

24 11 U.S.C. § 365(d)(3). The plain language of Section 365(d)(3) and the prevailing case law in  
25 this Circuit require that the unpaid post-petition rent and charges be paid immediately.

26 9. The Ninth Circuit has long recognized a debtor’s obligation to pay post-petition  
27 administrative rent under Section 365(d)(3) for nonresidential real property leases. Specifically,  
28 the Ninth Circuit holds that “section 365(d)(3) expresses the intent of Congress to secure for

1 lessors the full amount of rent due during the 60-day period while the trustee determines to accept  
2 or reject the lease, *regardless of any benefit to the estate*.<sup>4</sup> The statute does not require the lessor  
3 to take any action.” In re Pacific-Atlantic Trading Co., 27 F.3d at 405 (emphasis added). Courts  
4 throughout the country concur. *See In the Matter of The Barrister of Delaware, Ltd.*, 49 B.R. 446,  
5 447 (Bankr. D. Del. 1985); In re Dieckhaus Stationers of King of Prussia, 73 B.R. 969, 972-73  
6 (Bankr. E.D. Pa. 1987).

7 10. The primary goal of Section 365(d)(3) is to prevent the Landlords from becoming  
8 involuntary post-petition lender to a debtor’s estate. In re Handy Andy Home Imp. Centers, Inc.,  
9 196 B.R. 87, 95 (Bankr. N.D. Ill. 1996). The purpose of Section 365(d)(3) is to ensure that  
10 landlords receive immediate payment for lease obligations and prevent the injustice of landlords  
11 providing forced and uncompensated services to debtors. *See Montgomery Ward Holding Corp.*  
12 (In re Montgomery Ward Holding Corp.), 268 F.3d 205, 211 (3<sup>rd</sup> Cir. 2001); *see also In re*  
13 Cukierman, 265 F.3d at 851. In short, Congress and the courts have determined that a landlord  
14 should immediately receive the benefit of its bargain and be compensated for being compelled by  
15 the Bankruptcy Code to continue providing a debtor with critical post-petition services.

16 11. Section 363(e) provides:

17 Notwithstanding any other provision of this section, at any time, on  
18 request of an entity that has an interest in property used, sold, or  
19 leased, or proposed to be used, sold, or leased, by the trustee, *the*  
*court, with or without a hearing, shall prohibit or condition such*  
*use, sale, or lease as is necessary to provide adequate protection of*  
*such interest. . . .* (Emphasis added).

20 11 U.S.C. § 363(e).

21 12. Adequate protection is available to the Landlords. *See, e.g., Matter of Cont’l*  
22 Airlines, Inc., 154 B.R. 176, 180 (Bankr. D. Del. 1993) (finding adequate protection is available  
23 under Section 363(e) for a decrease in value due to the use, sale, *or lease* of an entity’s interest in  
24 property) (emphasis added); In re P.J. Clarke’s Restaurant Corp., 265 B.R. 392, 404 (Bankr.  
25 S.D.N.Y. 2001) (a landlord’s right to adequate protection seems to follow clearly from the  
26 language of Section 363(e)); In re Ernst Home Center, Inc., 209 B.R. 955, 966-67 (Bankr. W.D.

27  
28 <sup>4</sup> The Pacific-Atlantic Trading case was decided under a prior version of the Bankruptcy Code. Following the  
2005 amendment to the Bankruptcy Code, the 60-day period referenced by the Pacific-Atlantic Trading court is now  
120 days.

Ballard Spahr LLP  
2029 Century Park East, Suite 800  
Los Angeles, CA 90067-2909  
Telephone: 424.204.4400

1 Wash. 1997) (adequate protection is available to real property lessors under Section 363(e)); In re  
2 RB Furniture, Inc., 141 B.R. 706, 713-14 (Bankr. C.D. Cal. 1992) (adequate protection under  
3 Section 363(e) may even be broader than the rights encompassed under Section 365(d)(3)).

4 13. The Court may order payment of post-petition rent as a surcharge under Section  
5 506(c), or short of requiring the immediate payment of post-petition rent, it may provide adequate  
6 protection to Landlords by conditioning any waiver of Section 506(c) on the Landlords' receipt of  
7 post-petition rent for the Debtor's use and occupancy of the Premises. Section 506(c) provides  
8 that a trustee or debtor in possession may recover from property securing an allowed secured  
9 claim the "reasonable, necessary costs and expenses of preserving or disposing of, such property  
10 to the extent of any benefit to the holder of such claim . . . ." 11 U.S.C. § 506(c); See Precision  
11 Steel Shearing, Inc. v. Fremont Fin. Corp. (In re Visual Indus., Inc.), 57 F.3d 321, 325 (3<sup>rd</sup> Cir.  
12 1995). Therefore, Section 506(c) expressly permits a debtor to surcharge its lender where it can  
13 demonstrate that the administrative expenses were necessary, reasonable and directly provide a  
14 benefit to the secured party. See Hartford Fire Ins. Co. v. Norwest Bank (In re Lockwood Corp.),  
15 223 B.R. 170, 175 (8<sup>th</sup> Cir. BAP 1998). The premise underlying Section 506(c) is that the  
16 unsecured creditors should not be required to bear the costs of preserving a secured creditor's  
17 collateral. See, e.g., Visual Indus., Inc., 57 F.3d at 325; see also In re Evanston Beauty Supply  
18 Inc., 136 B.R. 171, 175 (Bankr. N.D. Ill. 1992). "Ample case authority exists which permits  
19 lessors to recover under Section 506(c) provided that the standards for recovery are met." In re  
20 World Wines, Ltd., 77 B.R. 653, 658 (Bankr. N.D. Ill. 1987). As with other claims under Section  
21 506(c), the standards for recovery are that the services were necessary and beneficial to the  
22 lender. Visual Indus., Inc., 57 F.3d at 325. The Debtor's post-petition use and occupancy of the  
23 Premises primarily and directly benefits the Debtor and all of its creditors.

24 14. To the extent consistent with the objections expressed herein, Landlords also join  
25 in the objections to the Nike Financing Motion of other landlords.

26 **III. CONCLUSION**

27 15. Based upon the foregoing, and such other and further evidence and arguments  
28 which may be presented at the hearing on the Nike Financing Motion, the Landlords request that

1 this Court: (a) limit any liens on the Leases to the proceeds of the distribution of the Leases only;  
2 (b) provide adequate protection for the payment of February 2018 rent; and, (C) grant such further  
3 relief as the Court deems proper.

4 Dated: January 30, 2018

**BALLARD SPAHR LLP**

Brian D. Huben  
Dustin P. Branch

By: /s/ Brian D. Huben

Brian D. Huben

Attorneys for Landlord Creditors  
Centennial Real Estate Company, LLC,  
Passco Companies, LLC, Starwood Retail  
Partners LLC, The Macerich Company,  
Vintage Real Estate, LLC, and Westfield, LLC

Ballard Spahr LLP  
2029 Century Park East, Suite 800  
Los Angeles, CA 90067-2909  
Telephone: 424.204.4400

**SCHEDULE A**

<b>CENTENNIAL REAL ESTATE CO.</b>		
Store No. 50	MainPlace	Santa Ana, CA
<b>PASSCO COMPANIES, LLC</b>		
Store No. 37	Hanford Mall	Hanford, CA
<b>VINTAGE REAL ESTATE, LLC</b>		
Store No. 21	SouthBay Pavilion	Carson, CA
<b>STARWOOD RETAIL PROPERTIES, LLC</b>		
Store No. 111	Capital Mall	Olympia, WA
Store No. 25	Northridge Mall	Salinas, CA
Store No. 38	Parkway Plaza Mall	El Cajon, CA
Store No. 107	Plaza West Covina	West Covina, CA
Store No. 9	Solano Town Center	Fairfield, CA
<b>THE MACERICH COMPANY</b>		
Store No. 36	Arden Fair	Sacramento, CA
Store No. 68	Arrowhead Town Center	Glendale, AZ
Store No. 71	Chandler Fashion Center	Chandler, AZ
Store No. 62	Desert Sky	Phoenix, AZ
Store No. 14	Fresno Fashion Fair	Fresno, CA
Unknown	Fresno Fashion Fair	Fresno, CA
Store No. 48	Inland Center	San Bernardino, CA
Store No. 87	Lakewood Center	Lakewood, CA
Store No. 116	Los Cerritos Center	Cerritos, CA
Store No. 22	Pacific View	Ventura, CA
Store No. 67	Paradise Valley	Phoenix, AZ
Store No. 86	Stonewood Center	Downey, CA
Store No. 69	Superstition Springs	Mesa, AZ
Store No. 82	The Mall of Victor Valley	Victorville, CA
Store No. 91	Vintage Faire Mall	Modesto, CA
Store No. 77	Westside Pavilion	Los Angeles, CA
<b>WESTFIELD, LLC</b>		
Store No. 21	Culver City	Culver City, CA
Unknown	Culver City	Culver City, CA
Store No. 46	Horton Plaza	San Diego, CA
Store No. 56	Misson Valley	San Diego, CA
Store No. 5	North County	Escondido, CA
Store No. 70	North County	Escondido, CA
Store No. 76	Palm Desert	Palm Desert, CA

Store No. 145	Plaza Bonita	National City, CA
Store No. 118	Southcenter	Tukwila, WA
Store No. 502	Southcenter (Sole)	Tukwila, WA
Store No. 3	Topanga	Canoga Park, CA
Store No. 93	Topanga	Canoga Park, CA
Store No. 501	Topanga (Sole)	Canoga Park, CA
Store No. 64	Valencia	Valencia, CA
Store No. 40	Valley Fair	Santa Clara, CA



## PROOF OF SERVICE OF DOCUMENT

I am over the age of 18 and not a party to this bankruptcy case or adversary proceeding. My business address is: 2029 Century Park East, Suite 800, Los Angeles, CA 90067-2909.

A true and correct copy of the foregoing document described as **LIMITED OBJECTION TO DEBTOR'S EMERGENCY MOTION FOR INTERIM AND FINAL ORDERS AUTHORIZING DEBTOR TO OBTAIN SHORT-TERM VENDOR FINANCING FROM NIKE USA, INC. AND GRANTING RELATED RELIEF** will be served or was served (a) on the judge in chambers in the form and manner required by LBR 5005-2(d); and (b) in the manner indicated below:

I. **TO BE SERVED BY THE COURT VIA NOTICE OF ELECTRONIC FILING ("NEF")** – Pursuant to controlling General Order(s) and Local Bankruptcy Rule(s) ("LBR"), the foregoing document will be served by the court via NEF and hyperlink to the document. On **January 30, 2018**, I checked the CM/ECF docket for this bankruptcy case or adversary proceeding and determined that the following person(s) are on the Electronic Mail Notice List to receive NEF transmission at the email address(es) indicated below:

Mikel R Bistrow on behalf of Creditor PayPal, Inc., dba Braintree  
mikel.bistrow@dinsmore.com, caron.burke@dinsmore.com

Dustin P Branch on behalf of Creditor Centennial Real Estate Company  
branchd@ballardspahr.com, carolod@ballardspahr.com;hubenb@ballardspahr.com;Pollack@ballardspahr.com

Dustin P Branch on behalf of Creditor Passco Companies, LLC  
branchd@ballardspahr.com, carolod@ballardspahr.com;hubenb@ballardspahr.com;Pollack@ballardspahr.com

Dustin P Branch on behalf of Creditor Starwood Retail Partners LLC  
branchd@ballardspahr.com, carolod@ballardspahr.com;hubenb@ballardspahr.com;Pollack@ballardspahr.com

Dustin P Branch on behalf of Creditor The Macerich Company  
branchd@ballardspahr.com, carolod@ballardspahr.com;hubenb@ballardspahr.com;Pollack@ballardspahr.com

Dustin P Branch on behalf of Creditor Vintage Real Estate, LLC  
branchd@ballardspahr.com, carolod@ballardspahr.com;hubenb@ballardspahr.com;Pollack@ballardspahr.com

Dustin P Branch on behalf of Creditor Westfield, LLC  
branchd@ballardspahr.com, carolod@ballardspahr.com;hubenb@ballardspahr.com;Pollack@ballardspahr.com

Christopher Celentino on behalf of Interested Party Courtesy NEF  
chris.celentino@dinsmore.com, caron.burke@dinsmore.com

Gregg M Ficks on behalf of Creditor 1777 S. Vintage Avenue Investors LLC  
gficks@coblentzlaw.com

Scott D Fink on behalf of Creditor Toyota Industries Commercial Finance, Inc.  
brodellecf@weltman.com

Scott F Gautier on behalf of Creditor Comvest Capital II, L.P.  
sgautier@robinskaplan.com

Scott F Gautier on behalf of Creditor Comvest Partners II, L.P.  
sgautier@robinskaplan.com

Ronald E Gold on behalf of Creditor Washington Prime Group Inc.  
rgold@fbtlaw.com, joguinn@fbtlaw.com

---

This form is mandatory. It has been approved for use by the United States Bankruptcy Court for the Central District of California.

David B Golubchik on behalf of Interested Party Courtesy NEF  
dbg@lnbyb.com, dbg@ecf.inforuptcy.com

Asa S Hami on behalf of Debtor Shiekh Shoes, LLC  
ahami@sulmeyerlaw.com,  
agonzalez@sulmeyerlaw.com;agonzalez@ecf.inforuptcy.com;ahami@ecf.inforuptcy.com

Asa S Hami on behalf of Plaintiff Shiekh Shoes, LLC  
ahami@sulmeyerlaw.com,  
agonzalez@sulmeyerlaw.com;agonzalez@ecf.inforuptcy.com;ahami@ecf.inforuptcy.com

Brian D Huben on behalf of Creditor Centennial Real Estate Company  
hubenb@ballardspahr.com, carolod@ballardspahr.com

Brian D Huben on behalf of Creditor Passco Companies, LLC  
hubenb@ballardspahr.com, carolod@ballardspahr.com

Brian D Huben on behalf of Creditor Starwood Retail Partners LLC  
hubenb@ballardspahr.com, carolod@ballardspahr.com

Brian D Huben on behalf of Creditor The Macerich Company  
hubenb@ballardspahr.com, carolod@ballardspahr.com

Brian D Huben on behalf of Creditor Vintage Real Estate, LLC  
hubenb@ballardspahr.com, carolod@ballardspahr.com

Brian D Huben on behalf of Creditor Westfield, LLC  
hubenb@ballardspahr.com, carolod@ballardspahr.com

William W Huckins on behalf of Creditor GGP Limited Partnership  
whuckins@allenmatkins.com, clynch@allenmatkins.com

William W Huckins on behalf of Creditor Taubman Landlords  
whuckins@allenmatkins.com, clynch@allenmatkins.com

Jay R Indyke on behalf of Creditor Committee The Official Committee of Unsecured Creditors of Shiekh Shoes,  
LLC  
jindyke@cooley.com, smckee@cooley.com

Ivan L Kallick on behalf of Interested Party Manatt, Phelps & Phillips, LLP  
ikallick@manatt.com, ihernandez@manatt.com

Dimitri G Karcazes on behalf of Creditor Comvest Capital II, L.P.  
dimitri.karcazes@goldbergkohn.com

David S Kupetz on behalf of Debtor Shiekh Shoes, LLC  
dkupetz@sulmeyerlaw.com, dperez@sulmeyerlaw.com;dperez@ecf.inforuptcy.com;dkupetz@ecf.inforuptcy.com

David S Kupetz on behalf of Plaintiff Shiekh Shoes, LLC  
dkupetz@sulmeyerlaw.com, dperez@sulmeyerlaw.com;dperez@ecf.inforuptcy.com;dkupetz@ecf.inforuptcy.com

David B Kurzweil on behalf of Creditor State Bank and Trust Company  
kurzweild@gtlaw.com, brattons@gtlaw.com;dyerj@gtlaw.com;perkinsd@gtlaw.com

Daniel A Lev on behalf of Interested Party Courtesy NEF  
dlev@sulmeyerlaw.com, asokolowski@sulmeyerlaw.com;dlev@ecf.inforuptcy.com;dwalker@sulmeyerlaw.com

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This form is mandatory. It has been approved for use by the United States Bankruptcy Court for the Central District of California.

Kevin Meek on behalf of Creditor Comvest Capital II, L.P.  
kmeek@robinskaplan.com, kevinmeek32@gmail.com; kmeek@ecf.inforuptcy.com

Angela Z Miller on behalf of Creditor New Era Cap Co., Inc.  
amiller@phillipslytle.com, styrone@phillipslytle.com

Ali M Mojdehi on behalf of Creditor Committee The Official Committee of Unsecured Creditors of Shiekh Shoes, LLC  
amojdehi@cooley.com, jgertz@cooley.com; bbyun@cooley.com; arego@cooley.com

Kelly L Morrison on behalf of U.S. Trustee United States Trustee (LA)  
kelly.l.morrison@usdoj.gov

Shannon O Nelson on behalf of Creditor Capri Urban Baldwin, LLC  
snelson@fnlaw.net, snelson@socnlaw.com

Ernie Zachary Park on behalf of Creditor The Irvine Company  
ernie.park@bewleylaw.com

Kristen N Pate on behalf of Creditor GGP Limited Partnership  
ggpbk@ggp.com

Dean G Rallis, Jr on behalf of Interested Party CAPREF Burbank LLC  
drallis@afrc.com, msinclair@afrc.com; AFRCTECF@afrc.com; mpham@afrc.com

Dean G Rallis, Jr on behalf of Interested Party CAPREF Lloyd II LLC  
drallis@afrc.com, msinclair@afrc.com; AFRCTECF@afrc.com; mpham@afrc.com

Allan D Sarver on behalf of Creditor 3829 Broadway LLC  
ADS@asarverlaw.com

William S Shepard on behalf of Creditor MM/PG (BAYFAIR) PROPERTIES, LLC  
scott.shepard@msrlegal.com, lisa.king@msrlegal.com

Howard Steinberg on behalf of Creditor State Bank and Trust Company  
steinbergh@gtlaw.com, pearsallt@gtlaw.com; laik@gtlaw.com

Michael A Sweet on behalf of Interested Party Fictitious Party  
msweet@foxrothschild.com, swillis@foxrothschild.com

Wayne R Terry on behalf of Creditor Gordon Brothers Retail Partners, LLC  
wterry@hemar-rousso.com

Wayne R Terry on behalf of Interested Party Courtesy NEF  
wterry@hemar-rousso.com

Ronald M Tucker, Esq on behalf of Creditor SIMON PROPERTY GROUP INC  
rtucker@simon.com, cmartin@simon.com; psummers@simon.com; Bankruptcy@simon.com

United States Trustee (LA)  
ustpregion16.la.ecf@usdoj.gov

Edward T Weber on behalf of Creditor Devinder Mavi and Janet Mavi  
ed@eweberlegal.com

Steven Werth on behalf of Debtor Shiekh Shoes, LLC

swerth@sulmeyerlaw.com,

asokolowski@sulmeyerlaw.com;kmccamey@sulmeyerlaw.com;asokolowski@ecf.inforuptcy.com;swerth@ecf.inforuptcy.com

Eric R Wilson on behalf of Creditor Rouse Properties, LLC

kdwbankruptcydepartment@kelleydrye.com, MVicinanza@ecf.inforuptcy.com

Claire K Wu on behalf of Debtor Shiekh Shoes, LLC

ckwu@sulmeyerlaw.com, mviramontes@sulmeyerlaw.com;ckwu@ecf.courtdrive.com;ckwu@ecf.inforuptcy.com

Claire K Wu on behalf of Interested Party Courtesy NEF

ckwu@sulmeyerlaw.com, mviramontes@sulmeyerlaw.com;ckwu@ecf.courtdrive.com;ckwu@ecf.inforuptcy.com

Claire K Wu on behalf of Plaintiff Shiekh Shoes, LLC

ckwu@sulmeyerlaw.com, mviramontes@sulmeyerlaw.com;ckwu@ecf.courtdrive.com;ckwu@ecf.inforuptcy.com

**II. SERVED BY U.S. MAIL OR OVERNIGHT MAIL** (indicate method for each person or entity served):

On **January 30, 2018**, I served the following person(s) and/or entity(ies) at the last known address(es) in this bankruptcy case or adversary proceeding by placing a true and correct copy thereof in a sealed envelope in the United States Mail, first class, postage prepaid, and/or with an overnight mail service addressed as follows. *Listing the judge here constitutes a declaration that mailing to the judge will be completed no later than 24 hours after the document is filed.*

**III. SERVED BY PERSONAL DELIVERY, FACSIMILE TRANSMISSION OR EMAIL** (indicate method for each person or entity served): Pursuant to F.R.Civ.P. 5 and/or controlling LBR, on **January 30, 2018**, I served the following person(s) and/or entity(ies) by personal delivery, or (for those who consented in writing to such service method), by facsimile transmission and/or email as follows. *Listing the judge here constitutes a declaration that personal delivery on the judge will be completed no later than 24 hours after the document is filed.*

Honorable Vincent P. Zurzolo

VIA PERSONAL DELIVERY

United States Bankruptcy Court

Edward R. Roybal Federal Building and Courthouse

255 E. Temple Street, Suite 1360 / Courtroom 1368

Los Angeles, CA 90012

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

January 30, 2018

Donna Carolo

/s/ Donna Carolo

Date

Type Name

Signature